No. 15,764

IN THE

United States Court of Appeals

For the Ninth Circuit

IVY L. VARNELL,
Appellant,

vs.

HOMER W. SWIRES, d/b/a H. W. SWIRES CONSTRUCTION and EMPLOYERS' MUTUAL CASUALTY COMPANY, a corporation,
Appellees.

Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEES.

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I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION.

This is an appeal taken from a final judgment rendered on the 11th day of June, 1957, by the District Court, Territory of Alaska, Third Judicial Division, in favor of the appellees (defendants in the lower Court) and against the appellant (plaintiff in the lower Court) (R. 39).

The District Court for the Territory of Alaska is a Court of general jurisdiction consisting of four

divisions of which the Third Division is one. Jurisdiction in the District Court is conferred by Title 48, U.S.C. Section 101. See also Alaska Compiled Laws Annotated, 1949, 53-2-1. Practice of procedure in the District Court since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure which were extended to the District Court for the District of Alaska on that date. 63 Stat. 445, 48 U.S.C. 103a.

Jurisdiction of this Court to review the judgment of the District Court is conferred by new title 48 U.S.C. Sections 1291 and 1294 and is governed by the Federal Rules of Civil Procedure.

II.

STATEMENT OF FACTS.

Appellant commenced this action in the Court below on the 21st day of November, 1957, by filing his complaint and having summons issued. Process was served on the defendants who responded by motion to dismiss, the same being granted. Appellant served and filed his amended complaint on the 14th day of March, 1947 (R. 1) alleging facts purporting to state a claim for relief under "The Workmen's Compensation Act of Alaska" (43-3-39 ACLA 1949) commencing with Sections 43-3-1 ACLA 1949 through 43-3-39 ACLA 1949. Thereafter appellees filed their motion to dismiss (R. 8), such motion being granted and judgment entered (R. 39). The record herein reflects that the appellant objected to the proposed judgment as submitted by the appellees after their first motion

to dismiss had been granted (R. 32) but the record reflects no further objection was made with regard to the judgment of record (R. 39). Appellant did file motion for rehearing on appellees' motion to dismiss amended complaint on the 15th day of April, 1957 (R. 33), which was denied.

III.

SUMMARY OF ARGUMENT.

Appellees submit that the trial Court properly dismissed plaintiff's complaint, properly allowed appellant to amend and properly dismissed plaintiff's amended complaint with prejudice denying its motion for rehearing and entered judgment in favor of the appellees. Appellees concede that on a motion to dismiss all facts well pled in the pleadings sought to be dismissed are admitted but for the purpose of the motion only. Appellees' motion to dismiss attacks appellant's amended complaint on the grounds that the Workmen's Compensation Act of Alaska was the appellant's exclusive remedy; that the Alaska Industrial Board had original jurisdiction of matters complained of in appellant's amended complaint; and that the Alaska Workmen's Compensation Act of Alaska does not provide for the type of attachment sought by appellant's amended complaint (R. 8). Plaintiff's amended complaint recited that the plaintiff brought his action for attachment of property as security for the payment of compensation and likewise prayed for judgment against the appellees for

compensation allegedly due together with penalties (R. 1).

Appellant contends that after having been granted an award (R. 6) and no appeal is filed therefrom and the employer and insurer shall fail to provide the temporary compensation and medical care, that the appellant is entitled then to maintain an action for attachment of property of the employer or the insurer as security. It is singularly noteworthy that in no place in the argument of the appellant does he state that the award, as made and appearing in the record, has not been paid by the insurer. It is likewise noteworthy to observe that the award grants the appellant compensation for temporary total disability commencing on the 31st day of July, 1956, and ending on the 31st day of October, 1956. Section 43-3-10 ACLA 1949 provides:

> "The right to compensation for an injury and the remedy therefore granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided for by this Act, shall accrue to employees entitled to compensation under this Act while it is in effect; nor shall any right or remedy, except those provided for by this Act accrue to the personal or legal representatives, dependents, beneficiaries under this Act, or next of kin of such employee; provided, however, that if an employer fails to secure the payment of compensation as required by this Act, by insuring with an authorized insurance carrier or by meeting the requirements for self-insurance, then any

injured employee, or, in case of death, his or her beneficiaries, may, at his, her or their option, elect to claim compensation under this Act or to maintain an action in the courts for damages on account of such injury or death; and, in the event of his, her or their election to bring such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead or prove as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due, in whole or in part, to the contributory negligence of the employee."

Appellant finds his remedy in Section 43-3-5, which provides:

"Every employee and every beneficiary entitled to compensation under the provisions of this act shall have a lien for the full amount of such compensation, including costs and disbursements of suit and attorneys' fee therein allowed or fixed, upon all of the property in connection with the construction, preservation, maintenance or operation of which the work of such injured or deceased employee was being performed at the time of the injury or death of such employee. For example: In the case of an employee injured or killed while engaged in mining or in any work connected with mining, the lien shall extend to the entire mine and all property used in connection therewith; and in the case of an employee injured or killed while engaged in fishing or in the packing, canning or salting of fish, or other branch of the fish industry, the lien shall extend to the entire packing, fishing, salting or canning

compensation allegedly due together with penalties (R. 1).

Appellant contends that after having been granted an award (R. 6) and no appeal is filed therefrom and the employer and insurer shall fail to provide the temporary compensation and medical care, that the appellant is entitled then to maintain an action for attachment of property of the employer or the insurer as security. It is singularly noteworthy that in no place in the argument of the appellant does he state that the award, as made and appearing in the record, has not been paid by the insurer. It is likewise noteworthy to observe that the award grants the appellant compensation for temporary total disability commencing on the 31st day of July, 1956, and ending on the 31st day of October, 1956. Section 43-3-10 ACLA 1949 provides:

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plant or establishment and all property used in connection therewith; and the same shall be the case with all other businesses, industries, works, occupations and employments. The lien herein provided for shall be prior and paramount and superior to any other lien of the property affected thereby, except liens for wages or materials as is now or may hereafter be provided by law, and shall be of equal rank with all such liens for wages or materials. The lien hereby provided for shall extend to and cover all right, title, interest and claim of the employer of, in, and to the property affected by such lien. Any person claiming a lien under this Act shall, within four months after the date of the injury from which the claim of compensation arises, file for record in the office of the recorder of the precinct in which the property affected by such lien is situated a notice of lien signed and verified by the claimant or someone on his or her behalf, and stating substance, the name of the person injured or killed out of which injury or death the claim of compensation arises, the name of the employer of such injured or deceased person at the time of such injury or death, a description of the property affected or covered by the lien so claimed, and the name of the owner or reputed owner of such property.

"The lien for compensation herein provided may be enforced by a suit in equity as in the case of the enforcement of other liens upon real or personal property, at any time within ten months after the cause of action shall arise. Nothing in this Section contained shall be deemed to prevent an attachment of property as security for

> the payment of any compensation as in this Act provided."

Appellees contend that the Workmen's Compensation Act of Alaska, an integrated act complete in and of itself, and as such provides exclusive remedies and does not contemplate an independent proceeding in the District Court for the attachment of property of the employer or insurer but rather provides for concurrent remedies and penalties contained in the act as well as procedures when a claim is disputed.

Appellant next contends that the District Court exceeded its authority by awarding attorney fees to the defendant insurance company after adjudging plaintiff's claim against defendants be dismissed with prejudice. (Appellant's Brief 10 and 32.) Appellees contend, as the record reflects (R. 39) that the judgment awarded attorney fees not to the insurer alone but to the defendants and that the District Court did not exceed its authority to award attorney fees to the defendants on the dismissal of the action of the plaintiff.

Appellant next contends that the lower Court erred and abused its discretion in dismissing the appellant's amended complaint with prejudice and without leave to amend. (Appellant's Brief 11 and 35.) Appellees contend that the District Court did not abuse its discretion in dismissing the appellant's amended complaint, with prejudice, and in fact no prejudice is involved in such action as such turns on the question of law, nor did it abuse its discretion is not granting

leave to amend inasmuch as the record is bare as to any application made by the appellant for leave to amend as the Federal Rules of Civil Procedure, Rule 15a, allows a party to amend his pleading once as a matter of course at any time before a responsive pleading is served, which the record reflects was done, but thereafter he may amend only by leave of the Court, and the record fails to reflect that any such leave was applied for.

IV.

ARGUMENT.

Appellant contends that he is entitled to bring an independent civil action in the District Court for temporary disability compensation benefits and to attach property of the employer or his insurer as security for the payment thereof. Appellant refers to Section 43-3-3, ACLA 1949, which requires that all compensation for temporary disability be paid periodically directly to the injured employee without waiting for an award by the board. It appears by the record (R. 6) that the appellant was entitled to compensation for temporary disability for a period from July 31, 1956, to October 31, 1956. This sum has been paid (R. 3). Appellant further contends that by virtue of the fact that the act provides that provisions of this act are made a part of every contract for hire, that the appellant can therefore commence an action independent of the act for the attachment of property as security for compensation al-

legedly due him under the act. It is clear from the act that no such intention is manifested anywhere therein. On the contrary, there is expressed a definite intention that the remedy provided by the act shall be exclusive. Section 43-3-10, ACLA 1949, provides:

> "The right to compensation for injury and the remedy therefore granted by this act *shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise, and no rights or remedies except those provided for by this act shall accrue to employees entitled to compensation under this act while it is in effect* * * *." (Emphasis supplied.)

Carrying appellant's argument to its logical conclusion, this would allow an injured workman to immediately, upon injury, file a claim with the Board and simultaneously commence an independent action in the District Court to secure compensation allegedly due him by way of attachment of property of the employer or insurer though the claim was controverted by the employer and insurer as a noncompensable claim. Appellant purports to find this alleged remedy in Section 43-3-5 ACLA 1949, in the last paragraph thereof which provides in part:

> "* * * Nothing in this section contained shall be deemed to prevent an attachment of property as security for the payment of any compensation as in this Act provided."

Appellees submit that the provision above quoted does not create a remedy on behalf of the employee nor does it indicate any intention that the employee has available to him any remedy outside the act. It

regard to adjudicated temporary disability is without basis in the record.

The appellant's chief complaint as contained in his brief appearing in the argument is that the Alaska Workmen's Compensation Act and the Alaska Industrial Board are inadequate to provide and care for the needs of injured workmen. Whether this is so in fact is arguable. However, in the event if such be the case, this is a question for the Legislature and not for the Courts. The accusation of misconduct on the part of the insurance carrier here is completely without foundation and supported only by the affidavit of counsel for the appellant and is categorically denied.

Appellant attributes to the appellees the assertion that only the Alaska Industrial Board can provide procedural remedies under the act. (Appellant's Brief 22.) This is incorrect and is not the position of the appellees. The appellees contend that the Alaska Industrial Board provides no procedural remedies but rather that the Alaska Workmen's Compensation Act does provide certain remedies which are exclusive and which must be followed by the employee under the scheme of the Act and that though some of these remedies are outside of the purview of the normal activity of the Industrial Board, they nevertheless are remedies provided for by the Workmen's Compensation Act and as part of the exclusive remedy as contemplated by Section 43-3-10 ACLA 1949, cited above. Appellant contends that the portion of Section 43-3-5 ACLA 1949, cited above,

concerning attachment is determinative of the issue here presented. (Appellant's Brief 20.) Appellant throughout his argument looks to this provision as the source of the remedy he attempts to assert through his action as commenced. He contends that the reference therein made refers only to compensation as provided for by the Act and does not relate to the attachment proceedings as set forth in Section 43-3-26 ACLA 1949, which provides for an attachment in an action brought for compensation by way of damages where the plaintiff or someone in his behalf filed an affidavit showing that the employee is entitled to recover compensation from the defendant under the provisions of the act, but that the defendant employer has failed to comply with the act. It appears that the damage action as contemplated and provided for by the Act and the provisional remedy provided by Section 43-3-26 ACLA 1949, allowing attachment in the damage action is based upon compensation. Appellees contend that the provisions of Section 43-3-6, cited above, where it provides in a negative fashion that the preceding provisions shall not prevent an attachment as security for compensation as in this act provided refer to Section 43-3-26 wherein attachment is provided under special circumstances where compensation is due and where the employer has failed to insure or quality as a self-insurer under the Act. It provides not the ordinary attachment but relieves the attaching plaintiff from complying with certain provisions requiring an undertaking and justification of surety. The damage action

as provided is, appellees submit, in the nature of compensation with the added penalty that the common law defenses available in the normal personal injury action are not available to the defendant employer as a result of his having failed to insure. The obvious purpose of such provision is to make the consequences so drastic that employers will make it their business to comply with the provisions of the act requiring insurance or self-insurance. Appellees contend that the provisions contained in Section 43-3-5 ACLA 1949, in the last paragraph thereof reading:

> "* * * Nothing in this section contained shall be deemed to prevent an attachment of property as security for the payment of compensation as in this Act provided."

clearly manifests an intention by the Legislature that the section of which the above quoted language is a portion is not to be construed so as to limit attachment provisions provided elsewhere in the act. In other words, the Legislature did not intend the lien provision to interfere with the attachment provision as provided in the Act inasmuch as the lien as provided by the statute might be inadequate to secure an employee where an employer had failed to qualify as a self-insurer or had failed to provide the necessary Workmen's Compensation Insurance. It is clear from a reading of that portion of Section 43-3-5, as set forth above, that the Legislature did not intend thereby to create a remedy outside the act in contravention of its declaration that the remedies herein

provided are exclusive but simply added the negative provision as a method of clarifying its intention not to nullify the provisions of a subsequent section concerning attachment under special circumstances.

Appellant contends that the Act is remedial legislation and accordingly should be liberally construed. With this statement, the appellees have no argument. However, this does not call upon the Court to construe the Act so as to provide additional remedies which are not expressly provided, in the face of Section 43-3-10 ACLA 1949, which make the remedies provided in the Act exclusive. That section expressly and unequivocally provides that no rights or remedies except those provided for by the Act shall accrue to the employee. All remedies as provided for in the Act are provided in explicit positive terms. Certainly there is nothing in the Act and nothing in Section 43-3-5 ACLA 1949 that provides a remedy of the type sought by the appellant. The Courts will not substitute its pronouncement for that of the Legislature as each have a separate and individual function to perform.

Appellant's citation of case authority is not of assistance to the question before the Court. The case law cited by appellant stands for broad generalization, and not one case is cited in point on the issue of whether appellant is entitled to sue and attach outside the Act. In fact, appellee's search has failed to show a case where it has even been attempted.

Accordingly, appellees submit that the action as brought by the appellant was not authorized or pro-

vided by the Alaska Workmen's Compensation Act and the District Court did not err in dismissing the appellant's amended complaint, with prejudice, in that it did not have jurisdiction to hear or interfere with the matters of the type brought before it by appellant's initial complaint or on the amended complaint.

Appellant next contends that the District Court exceeded its authority in awarding attorney fees to the appellees after it had dismissed the appellant's amended complaint, with prejudice. Appellant contends that the Territorial statute authorizing the assessment of attorney fees and the rules of the District Court for the District of Alaska are limited to cases in which the matter is decided on its merits. With regard to Section 55-11-51, which reads:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action or defense thereto which allowances are termed costs."

The appellees here prevailed in the defense of this action and appellant submits that whether or not the matter is subsequently heard on its merits or dismissed on motion does not change the contemplation of the statute whatsoever nor is this expressly or inferentially stated in the statute. The statute allows this to the "prevailing party" and this the appellees are and accordingly are entitled to attorney fees and the Court did not abuse its discretion in awarding

an attorney fee to these appellees. Thus in the case of *Reynolds v. Wayde,* 140 Fed. Supp. 713, 16 Alaska 221, the Court at page 226 states as follows:

> "The amount of fee to be allowed depends upon the nature and extent of the services rendered. This case did not go to trial but was disposed of upon motion to dismiss upon Rule 12b FRCP but did require considerable time and labor on the part of the Assistant Attorney General in briefing the question for determination by the Court. Under these circumstances, I feel that a fee of $250.00 is reasonable to be allowed to the defendants in this action."

Accordingly, appellees submit that under the statute, the District Court did not abuse its discretion neither in granting nor as to the amount of attorney fees. Under Rule 25 as referred to by the appellant of the amended uniform rules of the District Court for the District of Alaska becoming effective October 1, 1957, such rule provides:

(a) Allowance to prevailing party as costs.

Likewise here the words prevailing party are used, the appellee here, and accordingly the Court did not deviate from its rules in any respect.

The appellant thirdly contends that the District Court abused its discretion in dismissing the action below, with prejudice, and without leave to amend (R. 35). The initial complaint of the appellant was dismissed and pursuant to Rule 15a, F.R.C.P. the appellant filed an amended complaint. This he is entitled to do but once under the rule and this he has done. Thereafter, as provided for by the rule in the

event a dismissal of the amended complaint is had, he must obtain leave of the Court before he is entitled as a matter of law to file an amended complaint. The record is absolutely bare with regard to any request, motion or otherwise, on behalf of the appellant to file a second amended complaint.

The appellant makes much of the fact that the appellees here have levied execution upon its judgment to collect the attorney fee awarded which, of course, it was lawfully entitled to do. All that was required of the appellant was to apply to the Court for the fixing of a supersedeas bond and the posting of such. The record is bare of any indication that any application was so made by the appellant, although, according to the rules, the appellant was able to and did post a cost bond in the amount of $250.00. Appellees submit appellant's assertion is completely without merit.

V.

CONCLUSION.

Appellees submit the Court below committed no error and properly dismissed with prejudice appellant's complaint and awarded attorney fees to the prevailing party.

Dated, Anchorage, Alaska,
June 16, 1958.

Respectfully submitted,
DAVIS, HUGHES & THORSNESS,
By JOHN C. HUGHES,
Attorneys for Appellees.